STATE OF MICHIGAN

COURT OF APPEALS

In re C. SEYMOUR, Minor.

UNPUBLISHED
June 17, 2021

No. 355573
Delta Circuit Court
Family Division
LC No. 19-000420-NA

Before: JANSEN, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court's order terminating his parental rights to CS, who is an Indian child under the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. In addition to applying ICWA and MIFPA, the trial court found that termination of respondent's parental rights was warranted under MCL 712A.19b(3)(a)(*ii*), (c)(*i*), and (j). We affirm because there are no errors warranting reversal.

I. ADJUDICATION

A. STANDARD OF REVIEW

Respondent first argues that the trial court violated his due-process rights by conducting an adjudication trial without his presence or the presence of a lawyer. We review de novo whether a child protective proceeding complied with a parent's due-process rights. *In re Dearmon*, 303 Mich App 684, 693; 847 NW2d 514 (2014). Respondent, however, never argued at any stage, even after a lawyer was appointed to represent him, that his due-process rights were violated at the adjudication. Therefore, this constitutional challenge is unpreserved. We review unpreserved constitutional issues for plain error affecting a respondent's substantial rights. *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. (quotation marks omitted).

B. ANALYSIS

Our consideration of this issue is governed in part by the court rules applicable to child protection proceedings. The principles of statutory construction also apply to the interpretation of court rules. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). When interpreting a statute, the primary goal is to discern and give effect to the intent of the Legislature. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). In giving meaning to a statutory provision, this Court considers the provision within the context of the whole statute to "give effect to every word, phrase, and clause . . . [to] avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146, 644 NW2d 715 (2002).

"In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase." *In re Kanjia*, 308 Mich App 660, 663; 866 NW2d 862 (2014), quoting *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). "Child protective proceedings are initiated by the state's filing a petition in the family division of the circuit court requesting the court to take jurisdiction over a child." . "A respondent-parent may admit the allegations in the petition, plead no contest to the allegations, or demand a trial." *Id*. "When the petition contains allegations of abuse or neglect against a parent, MCL 712A.2(b)(1), and those allegations are proved by a plea or at the [adjudication] trial, the adjudicated parent is unfit." *Id*. at 663, quoting *In re Sanders*, 495 Mich at 405. "If the court takes jurisdiction over the child, the proceedings enter the dispositional phase[.]" *In re Kanjia*, 308 Mich App at 664. During this phase, "the trial court has broad authority to effectuate orders aimed at protecting the welfare of the child, including ordering the parent to comply with the Department of Health [and Human] Services [DHHS] case service plan and ordering the [DHHS] to file a petition for the termination of parental rights if progress is not being made." *Id*. The "adjudicative phase is only the first step in child protective proceedings, [but] it is of crucial importance because the procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights." *Id*. at 663 (quotation marks and citations omitted).

Our Supreme Court has distinguished between adjudicated and unadjudicated parents and held that "due process protections prevent a trial court from entering dispositional orders—including orders of termination—against an unadjudicated respondent." *In re Kanjia*, 308 Mich App at 670, citing *In re Sanders*, 495 Mich. at 422. Moreover, a parent has a right to a lawyer in child protective proceedings, including the right to an appointed lawyer. *In re Williams*, 286 Mich App 253, 275-276; 779 NW2d 286 (2009); MCR 3.915(B)(1). However, MCR 3.915(B) "charges parents with some 'minimum responsibility' in regard to having counsel appointed for their benefit." *In re Hall*, 188 Mich App 217, 222; 469 NW2d 56 (1991).[1]

[1] In *In re Hall*, this Court addressed and applied former MCR 5.915, the predecessor to current MCR 3.915. The court rules governing child protective proceedings were formerly codified in subchapter 5.901 *et seq.* of the Michigan Court Rules, but were redesignated to subchapter 3.901 *et seq.*, effective May 1, 2003, after *In re Hall* was decided. Current MCR 3.915(B) is substantially similar to former MCR 5.915(B).

MCR 3.915(B)(1)(b) requires that the trial court review "written financial statements," or determine otherwise, that a respondent is indigent before the respondent is entitled to an appointed lawyer. This rule requires affirmative action on the part of the respondent to have a lawyer appointed. *In re Hall*, 188 Mich App at 222. Moreover, as recognized in *In re Hall*, this right to counsel may be "waived" or relinquished by a respondent's conduct or inaction. *Id*., citing former MCR 5.915(B)(1)(c).

In this case, when respondent was asked at his first appearance at the January 11, 2019 preliminary hearing if he wanted a lawyer appointed, he initially stated that he may already have a lawyer, but that he would also like a court-appointed lawyer. The referee informed respondent that the court would have a lawyer appointed. However, respondent did not initially provide the necessary financial information to determine his eligibility. At the February 25, 2019 continued preliminary hearing, the trial court noted that it had received information that respondent was employed in Green Bay, Wisconsin, and stated that it would need to know about his employment, and possible reimbursement costs, before it could appoint a lawyer for him. Respondent, however, essentially vanished for most of the proceedings thereafter. When respondent did appear and complete the necessary form, the trial court appointed a lawyer for him. Until this point, respondent failed to take "affirmative action" to demonstrate that he was eligible for a court-appointed lawyer. He also waived any error by virtue of his lack of participation in all of the proceedings and lack of contact with the court or any caseworker before he submitted the necessary documentation to establish his eligibility for an appointed lawyer. See *In re Hall*, 188 Mich App at 222 (the respondent waived or relinquished her right to a lawyer where she failed to contact her lawyer for 16 months). Therefore, respondent has not shown that his due-process rights were violated because he did not have a lawyer present during the adjudication, given that he absented himself from the proceedings and failed to take the necessary steps to establish his eligibility for an appointed lawyer.

With respect to his own absence, respondent has also failed to show that the court could not proceed with the adjudication without his presence.

MCR 3.965(B)(1) provides that

> [t]he court must determine if the parent, guardian, or legal custodian has been notified, and if the lawyer-guardian ad litem for the child is present. The preliminary hearing may be adjourned for the purpose of securing the appearance of an attorney, parent, guardian, or legal custodian or may be conducted in the absence of the parent, guardian, or legal custodian if notice has been given or if the court finds that a reasonable attempt to give notice was made.

The trial court continued the initial preliminary hearing so that respondent could arrange to attend the hearing in person and make the necessary financial disclosures to obtain an appointed lawyer. With respect to the trial court's refusal to allow respondent to participate by phone at the continued hearing, the trial court cited MCR 2.402, which requires seven days' notice to use "communication equipment," which includes a telephone.

With respect to the adjudication trial itself, MCR 2.402 does not apply to that proceeding, but respondent did not request to attend by phone or participate in some other manner. The trial court was authorized to proceed without respondent's presence under MCR 3.972(B)(1), which states that "[t]he respondent has the right to be present, but the court may proceed in the absence of the respondent *provided notice has been served on the respondent*." (Emphasis added.) At the May 29, 2019 adjudication trial, the court stated that notice and a summons, informing respondent of the date and time of the trial, had been provided to respondent, but he had not appeared or otherwise contacted the court or petitioner. Accordingly, respondent cannot show that it was improper to proceed with the adjudication without his presence.

Respondent relies on *In re Collier*, 314 Mich App 558, 572; 887 NW2d 431 (2016), in support of his argument that his due-process rights were violated when the court proceeded with the adjudication without his presence or the presence of an attorney. However, this case is distinguishable from *In re Collier*. In that case, respondent's lawyer had already been appointed, the respondent was entitled to assume that he would be represented at the trial, and his lawyer essentially left the respondent without representation without his knowledge and consent. *Id*. at 571-573. By contrast, in this case, a lawyer had never initially been appointed because respondent never took the necessary steps to establish his eligibility for an appointed lawyer, so respondent had no reason to believe that he would be represented at the adjudication trial. Indeed, his absence, his failure to submit the necessary documentation to establish his eligibility, and his failure to contact the court or petitioner all suggested that he did not care whether he was represented and did not intend to participate at all. Even in *In re Collier*, this Court recognized that its decision did not mean that a respondent "can choose to not show up for an adjudication hearing and somehow stymie the adjudication process." *Id*. at 570 n 5.

In sum, the facts of this case are more similar to *In re Hall* than *In re Collier*. Under the circumstances, the trial court's decision to proceed with the adjudication trial without respondent's presence or the presence of a lawyer is supported by the court rules. Respondent has not shown that he is entitled to relief on the basis of this unpreserved issue.

II. SERIOUS EMOTIONAL OR PHYSICAL DAMAGE TO THE CHILD AND STATUTORY GROUNDS FOR TERMINATION

A. STANDARD OF REVIEW

Respondent next argues that the trial court erred by finding that petitioner had satisfied state and federal standards for terminating parental rights to an Indian child. This Court generally reviews for clear error a trial court's ruling that a statutory ground for termination has been proved by clear and convincing evidence. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Id*. "Issues involving the application and interpretation of ICWA are questions of law that are reviewed de novo." *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012). Similarly, this Court "review[s] de novo issues involving the interpretation and application of MIFPA." *In re Detmer/Beaudry*, 321 Mich App 49, 59; 910 NW2d 318 (2017).

B. ANALYSIS

Because CS is an Indian child, petitioner was required to satisfy federal standards under the ICWA in addition to establishing state grounds for termination of parental rights. *In re SD*, 236 Mich App 240, 246; 599 NW2d 772 (1999). The federal standard for termination of parental rights in cases involving Indian children is prescribed in 25 USC 1912(f) of the ICWA, which provides that "[n]o termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

At the termination hearing, the trial court qualified Heidi Nesberg as an expert in ICWA compliance. Nesberg testified that she had presented this case to the Child Welfare Committee of the Sault Ste. Marie of Chippewa Indians, and both she and the Tribal officials supported the petition for termination of respondent's parental rights. She stated that placement of CS in respondent's care would likely result in serious emotional or physical damage to the child. Nesberg's opinion was based on respondent's lack of participation, particularly his failure to address his mental health, parenting, and sobriety issues, and because CS had substantial concerns that needed to be addressed, which respondent had not demonstrated that he was able to do. In addition, another witnesses, Clarissa Bean, described CS's extensive mental health issues, and noted that respondent had been absent for two years and was unfamiliar with what was occurring with CS. The testimony from Bean and Nesberg, coupled with other evidence showing that respondent had failed to even minimally comply with his case-service plan requirements, supports the trial court's finding that the federal standard for termination of respondent's parental rights had been established. Thus, the trial court did not err by finding that petitioner satisfied the federal standard beyond a reasonable doubt.

To the extent that respondent also challenges the existence of a state statutory ground for termination, the trial court found that grounds for termination were established under MCL 712A.19b(3)(a)(*ii*), (c)(*i*), and (j), which allow for termination of parental rights under the following circumstances:

> (a) The child has been deserted under either of the following circumstances:
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> * * *
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> (*ii*) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.
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> * * *
>
> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

Respondent's arguments only address § 19b(3)(j); they do not address the trial court's findings with respect to §§ 19b(3)(a)(*ii*) or (c)(*i*). Because only one statutory ground is required to justify termination of parental rights, *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991), respondent's failure to address §§ 19b(3)(a)(*ii*) and (c)(*i*) precludes appellate relief with respect to this issue. Regardless, the evidence supports the trial court's finding that all three grounds were established by clear and convincing evidence.

With respect to § 19b(3)(a)(*ii*), petitioner presented ample evidence that respondent had deserted CS and had not sought custody of her for far longer than 91 days during the proceedings. Indeed, the trial court noted that there had been a gap of 599 days from the time that respondent initially participated by telephone until he "reappeared" on September 2, 2020. The trial court's determination with respect to § 19b(3)(c)(*i*) is supported by the substantial testimony that respondent failed to do anything for the entirety of the proceedings to rectify the reasons that led to the adjudication. With respect to § 19b(3)(j), "a parent's failure to comply with the terms and conditions of his or her service plan is evidence that the child will be harmed if returned to the parent's home." *In re White*, 303 Mich App 701, 711; 846 NW2d 61 (2014). Nesberg's testimony supports the trial court's finding that grounds for termination were established under § 19b(3)(j). Accordingly, the trial court did not clearly err when it found that petitioner had established the state grounds for termination by clear and convincing evidence.

III. ACTIVE EFFORTS AT REUNIFICATION

Respondent also argues that petitioner failed to satisfy the federal standard that there be active efforts to prevent the breakup of the family. In termination proceedings involving ICWA and the MIFPA, the trial court must find, among the other requirements for termination, proof by clear and convincing evidence "that active efforts were made to prevent the breakup of the family." *In re England*, 314 Mich App 245, 253; 887 NW2d 10 (2016). " '[A]ctive efforts' require more than the 'reasonable efforts' required under state law," such that the petitioner must "take[ ] the client through the steps of the plan" instead of simply requiring a respondent to satisfy certain goals. *In re JL*, 483 Mich 300, 321; 770 NW2d 853 (2009) (quotation omitted). Petitioner may not refuse to offer services because it believes that doing so would be futile, but active efforts need not be infinite, "so there comes a time when [petitioner] or the tribe may justifiably pursue termination without providing additional services." *Id*. at 326-327.

Petitioner made active efforts to prevent the breakup of the family. With respect to services offered to CS's mother and other family members, Bean and Nesberg testified that offered services included substance abuse assessments, drug screenings, inpatient substance abuse services, outpatient substance abuse counseling, parenting classes, substance abuse and mental health services, a referral to the Indian Outreach Program, housing assistance, parenting time, and parenting worksheets. With respect to respondent, Bean testified that petitioner had offered, and was prepared to offer, services that included parenting time, mental health treatment, anger

management counseling, and housing assistance, and she had also made a referral to the Indian Outreach Services. Bean could not make a parenting class referral for respondent because he was not in Michigan, but respondent did not participate in any online options either. Bean had also provided respondent with worksheets after the September 2020 hearing, but did not know if he completed them. Bean also described her unsuccessful attempts to contact respondent and to arrange for his return to Michigan for services and parenting times with CS. In addition, Nesberg, who was qualified as an expert in compliance with ICWA and MIFPA, testified that cultural considerations were taken into account when determining whether active efforts at reunification had been made and that the requisite active efforts were indeed made, but were not successful mostly because respondent had made only a minimal effort to address any of the issues that brought CS into care.

The "active efforts" requirement does not mean that petitioner must undertake Herculean efforts to reunify an uninterested parent with their child. *In re JL*, 483 Mich at 327. Short of physically dragging respondent to Michigan and compelling his participation in services, it is unclear what else petitioner could have done to reunite respondent with CS. Consequently, the record supports that petitioner made active efforts to prevent the breakup of the family to the extent that she could do so.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause